Supreme Court, U.S.
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No. 00-895

In The

SUPREME COURT of the UNITED STATES

KEVIN WEDDERBURN,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition For a Writ of Certiorari to The United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Respondent states that Congress's overarching purpose in enacting 8 U.S.C. § 1432 was to preserve family unity and avoid hardship.[1] Respondent further admits that, in enacting § 1432, Congress intended to permit single-parent transmission of citizenship when the naturalizing parent is the only parent who has an ongoing legal relationship with the child. Kevin

[1] Respondent identified this statutory purpose on pages 25-26 of its response to Kevin Wedderburn's opening brief in the Seventh Circuit.

Wedderburn fits squarely within this profile. Kevin's mother abandoned him at birth, and explicitly relinquished custody to Kevin's father when Kevin was seven years old. App. 31a. Kevin's father formalized his parental ties to Kevin by legitimating Kevin under Jamaican law, and worked for five years to bring Kevin to this country to live with him. He maintained legal custody of Kevin until Kevin became an adult, and naturalized before Kevin turned 18. These facts are undisputed, and Respondent's failure to acknowledge them should not be allowed to obscure how well they correspond to Congress's purpose.

The question is whether the distinctions drawn in § 1432(a)(3), which condition a child's ability to gain citizenship through his citizen parent on the gender of the parent, the parent's marital status, and the legitimacy of the child, are appropriately related to the statute's purpose. This question, and that of the proper level of scrutiny to be applied to such distinctions, will be largely resolved by this Court's decision in *Nguyen v. INS*, 208 F.3d 528 (5th Cir.), *cert. granted*, 69 U.S.L.W. 3191 (Sept. 26, 2000), now pending before the Court. The Court should grant the petition for certiorari and hold this case for remand for further proceedings consistent with its decision in *Nguyen*.

I. This Case Presents Important Issues of Gender Discrimination Very Similar To The Gender Discrimination Claim Pending Before This Court In *Nguyen v. INS*.

Respondent argues that this case presents no gender discrimination claim because Kevin Wedderburn is legitimated, and the statute precludes both unwed mothers and unwed fathers from single-handedly conferring citizenship on their legitimated children. But this argument ignores the statute's total exclusion of unwed fathers from its provisions: no unwed father, whether he has legitimated his child or not, can ever

single-handedly pass citizenship to his child. Even § 1409, the provision of the Immigration and Nationality Act ("INA") challenged in *Nguyen v. INS*, is not so restrictive. That statute imposes extra requirements on an unwed father, arguably so that he can demonstrate a tie to his child akin to the tie the law ascribes to the unwed mother of an illegitimate child. By comparison, § 1432 provides no route, however burdensome, by which an unwed father can put himself in a position comparable to an unwed mother's. Respondent has offered no explanation for treating unwed fathers so differently, depending on whether they are native-born or naturalized citizens. Congress's intention to treat parents the same in their ability to pass citizenship to foreign-born children, regardless of whether the parent is native-born or naturalized, is evident in the Child Citizenship Act of 2000, which explicitly treats the two groups identically. *See* Pub. L. 106-395; 114 Stat. 1631, to be codified at 8 U.S.C. § 1431(a).

An unwed father must legitimate his child in order to establish a legal parent-child relationship – the same legal status that an unwed mother establishes by giving birth to a child. Moreover, to bring Kevin into this country, Fitzroy Wedderburn had to show both that he was Kevin's father and that he was married to Kevin's step-mother Velma.[2] Respondent argues that this necessary -- and socially desirable – process of legitimation is actually a trap for the unwary, because legitimation strips an unwed father of any ability to claim that
§ 1432 treats him differently from an unwed mother.

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[2] Velma became a citizen seven years before Fitzroy did. Having her, rather than Fitzroy, file the petition for Kevin avoided an extensive backlog in the preference system. *See* Kurzban, Ira J., *Kurzban's Immigration Law Sourcebook*, 6th Ed. (1998), at 515.

The plurality in *Miller*, however, is to the contrary. There, Justice Stevens, joined by Chief Justice Rehnquist, held that unwed mothers of illegitimate children and unwed fathers who have legitimated their children are similarly situated in practical as well as legal terms. *Miller v. Albright*, 523 U.S. 420, 444 (1998). Under this Court's prior reasoning, Fitzroy Wedderburn rendered himself similar, not dissimilar, to the class of mothers of illegitimate children who are favored by § 1432(a)(3), when he legitimated Kevin.

Respondent attempts to convince this Court that the gender discrimination inherent in § 1432 does not matter for three reasons: (1) § 1432 deals with citizenship transmitted by naturalized parents to their minor children, while § 1409 deals with citizenship transmitted by native-born parents to their children at birth; (2) any distinctions drawn in § 1432 are subject only to minimal scrutiny under *Fiallo v. Bell*, 430 U.S. 787, 794 (1977); and (3) Kevin has no standing to raise a gender-discrimination claim. Respondent is wrong on all three counts.

First, § 1432 and § 1409 are both automatic citizenship provisions, though they are triggered by different events. In either case, parents can transmit citizenship to their children as soon as they themselves possess it. In either case, the child acquires full citizenship; children of naturalized citizens do not acquire a different, or inferior, form of citizenship compared to children of native-born citizens. Nor is there any meaningful distinction in terms of where the child's "loyalties" lay before the citizenship was made. In fact, people claiming citizenship under § 1409 often do so long after birth: Ms. Miller was 22 years old when she claimed citizenship; Mr. Nguyen was 27; and Mr. Lake, respondent in the government's recently filed petition for certiorari, *Lake v. Reno*, 226 F.3d 141 (2nd Cir), *cert. filed*, 69 U.S.L.W. 3418, No. 00-963 (Dec. 11, 2000), was 45.

Second, while Congress may have broad latitude to establish the conditions under which immigrants may enter or

remain in the country under *Fiallo*, there is no reason to think it has comparable latitude to treat the children of citizens differently, depending on whether their parents acquired citizenship by birth or by naturalization. The government misinterprets Justice Breyer's language in his *Miller* dissent: for Justice Breyer, broad Congressional discretion under *Fiallo* applies to immigration rules, and standard equal protection doctrines apply to citizenship provisions such as the one under review in *Miller*. Justice Breyer says nothing to support Respondent's view that *Fiallo* draws a line through the middle of this country's automatic citizenship rules. Section 1432 and § 1409 should be reviewed for constitutionality under a single standard, and this Court's decision in *Nguyen* will clarify what that standard is.

Finally, Respondent is also mistaken in thinking that Kevin's standing to raise a gender discrimination claim distinguishes this case from *Nguyen* and *Miller*. The *Miller* decision was fragmented on this issue, but at least two Justices assumed that the gender discrimination claim was properly before the Court no matter what Lorelyn Miller's father had done or failed to do. 523 U.S. at 433. Three more thought that Mr. Miller's attempt to recognize his daughter after she reached adulthood was enough to allow her to pursue his gender discrimination claim. 523 U.S. at 473. Here, Fitzroy Wedderburn took steps to legitimate Kevin when Kevin was a child, and worked for years thereafter to bring him to the United States. Fitzroy Wedderburn took the necessary legal steps for his son when, under the provisions of the Immigration and Nationality Act, it mattered.

Not only was Fitzroy more conscientious in acknowledging his child than Mr. Miller was, but Kevin's case, unlike *Miller*, is a deportation proceeding in which the INS's jurisdiction over him depends on whether he is or is not a citizen. The fact that Fitzroy did not file a separate lawsuit after the INS commenced proceedings against Kevin should not

preclude consideration of the gender discrimination inherent in § 1432.[3]

Because the decision in *Nguyen* will largely dictate the outcome of the gender discrimination claim in this case, and because this Court's prior decisions support Kevin Wedderburn's standing to bring this claim, certiorari is appropriate.[4]

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[3] Nor should it matter that Fitzroy was not made a party in Kevin's deportation case, as Mr. Nguyen's father apparently was. 208 F.3d at 534. In fact, we do not understand how the Court of Appeals could treat Mr. Nguyen's father as a party, since the INS has no jurisdiction over citizens, and no precedent supports permitting family members to raise their own claims in a deportation case.

[4] Respondent also continues to assert that Kevin Wedderburn could have sought citizenship under other discretionary provisions of the Immigration Act. While this may be so, the same is true for Mr. Nguyen. The availability of alternate routes to citizenship is irrelevant to whether § 1432 violates the Constitution. *See Trimble v. Gordon*, 430 U.S. 762, 774 (1977).

II. This Case Presents Important Issues of Legitimacy Discrimination Very Similar To The Gender Discrimination Claim Pending Before This Court In *Nguyen v. INS*.

Respondent attempts to dismiss Kevin Wedderburn's claim that § 1432 discriminates on the basis of legitimacy on three grounds, none of which is correct.[5] First, Respondent claims that under *Fiallo v. Bell*, 430 U.S. 787 (1977), which was decided the same day as *Trimble v. Gordon*, 430 U.S. 762 (1977), legitimacy-based distinctions in immigration statutes are entitled only to deferential review. But, as discussed above, the differential treatment in *Fiallo* rested on the leeway given to Congress in matters such as the immigration preference at issue in that case, not on any notion that Congress can treat native-born and naturalized citizens differently, or grant or withhold citizenship based on a child's legitimacy. If the *Fiallo* standard of review does not insulate the gender distinctions in § 1409 -- as a majority of the Court in *Miller* apparently believed, and the Court in *Nguyen* will decide -- it does not insulate the legitimacy-based distinctions in § 1432(a)(3) either.

Respondent's second argument is that § 1432(a)(3) does not draw distinctions based on legitimacy, but this argument is contradicted both by the court below, App. 14a, and by the language of the statute, which provides that illegitimate children may gain automatic citizenship through one unwed parent (the mother), but legitimate children may not. Moreover, Respondent acknowledges that the statute makes it impossible for legitimate children with two living parents to derive citizenship from one parent unless their parents were married and are "legally separated." Respondent says this requirement

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[5] Kevin's standing to raise his legitimacy discrimination claim has not been challenged.

does not trigger any heightened scrutiny,[6] but in *Trimble* this Court held just the opposite when it struck down a statute granting benefits only to the children of married parents. This Court's long-standing rejection of distinctions that penalize children because their parents never married is all the more appropriate in light of the sweeping trend toward legal acceptance of legitimation without marriage.[7]

Finally, Respondent suggests that there is no way to remedy the statute's legitimacy-based distinctions to provide a remedy to Kevin, but this is simply untrue, as discussed in greater detail in the Petition for a Writ of Certiorari. Pet'n at 18-20. The recent amendments to § 1432 support the excision of the discriminatory provisions in a manner that would grant Kevin Wedderburn citizenship through his father. *See*, 8 U.S.C. § 1431(2001).

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[6] As discussed in the Petition for a Writ of Certiorari ("Pet'n") at 14-16, the court below failed to apply any level of scrutiny to § 1432(a)(3)'s distinctions based on legitimacy and the parents' marital status. There is thus no basis for Respondent's assertion that the court "determined" that Congress was not constitutionally required to allow an unmarried custodial parent to pass citizenship to a child under the same conditions as a "legally separated" (i.e., divorced) custodial parent. Respondent's citation to page 14a of the Appendix is misleading; neither this page nor any other supports that proposition.

[7] Over 30 countries around the world now provide for legitimation of children without the parents' marriage. *See* Pet'n at 17, n.5. There is no support in the record for the hypothesis of the court below (and Respondent here) that children legitimated without their parents' marriage constitute only a "small subset" of the families covered by the INA.

CONCLUSION

For the reasons set forth herein and in the Petition for a Writ of Certiorari, the Court should grant the Petition and hold the case for remand in light of the Court's decision in *Nguyen*.

Respectfully submitted,

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